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No. 00-456

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State court's refusal to apply or even recognize the preclusive effect of a Federal court's findings of fact related to an identical issue of whether a "taking" occurred constitutes a violation of the "Full Faith and Credit Clause," the "Supremacy Clause" of the United States Constitution and/or the federal "Full Faith and Credit" statute.

LIST OF ALL PARTIES

PURSUANT TO RULE 21.1(B)

The undersigned counsel of record for the State of Louisiana, Department of Natural Resources, Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

I State of Louisiana;
2. Louisiana Department of Natural Resources;
3. Keith J. Asevado;
4. Albert J. Avenal, Jr.;
5. Chris P. Barthelemy;
6. Gary Barthelemy;
7. Kendall M. Barthelemy;
8. Neal Beshel;
9. Anna Butscher Buras;
10. Anna Bessie Bodden Buras;
11. Neal Buras;
12. Ralph J. Buras, Jr.;
13. Ralph J. Buras, Sr.;
14. Richard Buras;
15. Donald J. Campo, III;
16. Donald J. Campo, Jr.;
17. Donald J. Campo, Sr.;
18. Donald J. Campo;
19. Ernest J. Campo;
20. Mathilda Guerra Campo;
21. Peggy Campo;
22. Pero B. Cibilic;
23. Anna Cibilich;

24. Domenica Cibilich;
25. Richard H. Clark, Sr.;
26. Clear Water Oysters, Inc.;
27. Crescent Oysters, Inc.;
28. Irvin Cross;
29. Melvin Cross;
30. Sedonia Cross;
31. Luka Cutura;
32. Theresa A. Dauzart;
33. Clarence R. Duplessis;
34. Clarence R. Duplessis, Jr.;
35. Leona Duplessis;
36. Byron Encalade;
37. Carliss J. Encalade;
38. Leon M. Encalade;
39. Nathaniel Encalade as representative for the Estate of Joseph Encalade;
40. Stanley Encalade;
41. M.J. Farac, Jr.;
42. M.J. Farac, Sr.;
43. Maja B. Farac;
44. Sinajka Farac;
45. Daniel R. Fernandez;
46. Raymond Fernandez, Jr.;
47. Raymond Fernandez, Sr.;
48. Fox Oyster Company, Inc.;
49. Fox Industries, Inc.;
50. Fox Seafood, Inc.;
51. Ann P. Fox;
52. Calvin R. Fox, Jr.;
53. Dale E. Fox;
54. Gene L. Fox;

55. Justin Ryan Fox;
56. Kenneth A. Fox;
57. Kenneth Ryan Fox;
58. Marie 0. Fox;
59. Rodney L. Fox;
60. Rodney L. Fox, Jr.;
61. Ross Louis Fox
62. Estate of M.J. Franicevich;
63. Rene Ganer;
64. Gulf Quality Inc.;
65. Michael Guttuso;
66. Abraham J. Harness;
67. Morris Harvey;
68. Nathan G. Harvey;
69. Howard Hingle;
70. Laurie Duplessis Holiday;
71. Herman Isadore, Jr.;
72. J & P Oysters, Inc.;
73. Estate of Mayo P. Jones, Jr.;
74. Robert M. Keenan;
75. Donald J. Kennair, 111;
76. Donald J. Kennair, Jr.;
77. Ralph James Kieff, Jr.;
78. Ralph James Kieff, Sr.;
79. Joseph Labruzzo;
80. Rachel Fox Labruzzo;
81. Joey G. Latapie;
82. Clifford Lebouef,
83. Jean Lebouef;
84. Lorne Lebouef,
85. Irwin H. Lefebvre, Jr.;
86. Ante Lepetich;

87. Mato Lepetich;
88. John Martinez, Jr.;
89. John Martinez, Sr.;
90. Marty A. Melerine, Jr.;
91. Matthew David Meyers;
92. Mitchell Meyers;
93. Rhonda Fox Meyers;
94. Allan C. Molero, Jr.;
95. Janet Molero;
96. Elenora Robin Mook;
97. Cladmon Narcisse;
98. Felix Narcisse;
99. Oliver B. Narcisse, Sr.;
100. Nicolae Nitica;
101. Oyster Fisheries, Inc.;
102. Curt Pannagl;
103. Patti L. Pannagl;
104. Richard Patterson;
105. Pean Inc.;
106. Josip Piacun;
107. Marinko Piacun;
108. Pasko Piacun;
109. J. Piacun Company, Inc.
110. Anton N. Popich;
111. Ivo, N. Popich;
112. Port Sulphur Fisheries, Inc.;
113. Domingo Rano;
114. Arthur Reddick;
115. Arthur A. Reddick, Jr.;
116. Kevin Joseph Reddick;
117. John Dwight Riley;
118. Van Robin;

119. Adam R. Serigne;
120. Lionel R. Serigne, Sr.;
121. O'Neil N. Serigne;
122. Phillip H. Simmons, Jr.;
123. Helen Tesvich Skansi;
124. Nick L. Skansi;
125. Estate of Frank S. Slavich, Sr.;
126. Frank S. Slavich, Jr.;
127. Taco, Inc.;
128. John Taliancich;
129. Ann S. Tesvich;
130. Estate of Kuzma J. Tesvich;
131. Frances Lynn Tesvich;
132. Tinson Seafood Company;
133. Tesvich Oysters Inc.;
134. Ivo Tesvich;
135. Jane P. Tesvich;
136. John A. Tesvich;
137. Judi Tesvich;
138. Kuzma I. Tesvich;
139. Lisa K. Tesvich;
140. Maria J. Tesvich;
141. Nedo Tesvich;
142. Peter J. Tesvich;
143. Peter Luke Tesvich;
144. Charlie Thompson;
145. Steve Thompson;
146. Nikola Vekic;
147. Robert White;
148. Austin Yawn;
149. Nikola Zarak.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES PURSUANT TO RULE 2 1.1 (B).....ii

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ix

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS/CONSTITUTIONAL ARTICLES INVOLVED 3

STATEMENT OF THE CASE 4

A. Summary 4

B. Plaintiffs' Allegations in the Parallel Federal and State Proceedings.....7

C. Proceedings Below 8

REASONS FOR GRANTING THE PETITION.....11

1) The Fourth Circuit's Opinion Presents a Direct Conflict with Applicable Federal Law as Regards the Preclusive Effect of a Prior Federal Decision In Subsequent State Court Proceedings 11

2) The Lower Court's Decision Also Conflicts With Applicable State Law.....11

3) The Question Presented Has Serious Public Policy Considerations 11

ARGUMENT 11

I. The Lower State Courts' Decisions Present a Direct Conflict with Federal Law 11

II. The Lower State Courts' Decisions Conflict With Decisions of Other States 13

III. Application of the Federal Common Law of Collateral Estoppel Results In The Dismissal of Plaintiffs' Claims 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page**

Abrams v. Morial
968 F.Supp. 1106 (E.D. La. 1997).....13

Aerojet-General Corp. v. Askew
511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S 908 (1975).....13

Allen v. McCurry
449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).....12

Anderson v. Phoenix Investment Council of Boston
440 N.E.2d 1164 (Mass. 1982) 12

Avenal v. United States
100 F.3d 933 (1995).....1,6,17

Avenal v. United States
33 Fed.Cl. 778 (1995).....1,16

Bernhard v. Bank ofAmerica Nat. Trust & Savings Assn.
122 P.2d 892 (Cal. 1942).....16

Chemtron Corp. v. Business Funds, Inc.
682 F.2d 1149 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, *cert. denied*, 406 U.S. 1013 (1983) 13

Commercial Box & Lumber Co. v. Uniroyal, Inc
623 F.2d 371 (5th Cir. 1980) 13

Copeland v. Merrill Lynch & Co.
47 F.3d 1415 (5th Cir. 1995) 15

Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.
120 U.S. 141, 7 S.Ct. 482 (1887) 12

Cromwell v. County of Sac
94 U.S. 351, 24 L.Ed. 195 (1876).....12

Embry v. Palmer
107 U.S. 3, 2 S.Ct. 25 (1872).....12

Exhibitors Poster Exch., Inc. v. National Screen S. C.
517 F.2d 110 (5th Cir. 1975) 16

FDIC v. Lee
942 F.Supp. 255 (E.D. La. 1995).....13

Heck v. Humphrey
512 U.S. 475, 114 S.Ct. 2364 (1994).....12

Jeanes v. Henderson
688 S.W.2d 100 (Tex. 1985), *rehearing of cause overruled* (May 1, 1985).....11

Kremer v. Chemical Construction Corp.
456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).....12

Magnolia Petroleum Company v. Hunt
320 U.S. 430, 64. S.Ct. 208 (1943).....12

McNeal v. Paine Webber Jackson & Curtis
293 S.E.2d 331 (Ga. 1982) 14

Nagle v. Lee
807 F.2d 435 (5th Cir. 1987).....13

Parklane Hosiery Co., Inc. v. Shore
439 U.S. 322, 99 S.Ct. 649 (1979).....16

Penn Central Transportation Co. v. City of New York
438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631
(1978).....6,12

Pilie & Pilie v. Metz
547 So.2d 1305 (La. 1989) 13

Recoveredge L.P. v. Pentecost
44 F.3d 1284 (5th Cir. 1995) 13

Reeder v. Succession of Palmer
623 So.2d 1268 (La. 1993) 12

Rennie v. Freeway Transport
656 P.2d 919 (Or. 1982).....14

Stoll v. Gottlieb
305 U.S. 165, 59 S.Ct. 134 (1938).....12

Stone v. Entergy Services, Inc.
99-0236*3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141, *writ denied*, 99-2719 (La. 11/24/99), 750 So.2d 989 14

Stovall v. Price Waterhouse Co.
652 F.2d 537 (5th Cir. 1981) 13

Articles of the Constitution **Page**

U.S.C.A. Const. Art. IV, § 1 .....i,3,11

U.S.C.A. Const. Art. Vl § 2 .....i,3,11

U.S.C.A. Const. Art. V 5,7

Article 1, Section 4 of the Louisiana Constitution of 1974 4,8

Statutes and Rules

28 U.S.C. § 1257 2

28 U.S.C. § 1738 .....i,3,12

U.S. Supreme Court Rule 10 2

Miscellaneous Texts and References

C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, Jurisdiction Section 4468 (1981) 14

Restatement (2d) of Judgments Section 87 (1982) 13,14

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Louisiana, Department of Natural Resources, respectfully petitions this Court to issue a writ of certiorari to review the Judgment of the Louisiana Court of Appeal for the Fourth Circuit on rehearing entered in, "Albert J. Avenal, Jr., et at v. The State of Louisiana and the Department of Natural Resources," bearing Civil Action No. 99-C-0127, upon which the Supreme Court of Louisiana in, "Albert J. Avenal, Jr., et at v. The State of Louisiana and the Department of Natural Resources," bearing Civil Action No. 00-CC-1077, has declined to exercise its discretionary, supervisory jurisdiction. The State Fourth Circuit initially dismissed the Plaintiffs' claims, just as the Federal Circuit had dismissed these same Plaintiffs' claims in a parallel proceeding. The Fourth Circuit applied the federal law of collateral estoppel, and, in turn recognized the preclusive effects of the prior federal judgment. In the subsequent decision of the divided 3-2 panel of the Fourth Circuit, on rehearing, the Fourth Circuit completely reversed itself and would not give full faith and credit to, nor recognize the preclusive effect of, the prior federal decision which had dismissed the Plaintiffs' claims in their entirety on the basis that there simply was no "taking" in a constitutional sense.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit (App. E, infra, A-46 through A-57) is reported at 100 F.3d 933 (Fed. Cir. 1996).

The Opinion of the United States Court of Federal Claims is reported at 33 Fed.Cl. 778 (1995). (App. F, infra, A-58 through A-90).

The decision of the Supreme Court of Louisiana to decline review of the lower courts' decisions in this case (App. D, infra, A-45) is unreported.

The decision of the Louisiana Court of Appeal for the Fourth Circuit on rehearing (App. A, infra, A-1 through A-18) is reported at 2000 WL 320460, 99-0127 (La.App. 4th Cir. 3/15/00).

The decision of the original five judge panel of the Louisiana Court of Appeal for the Fourth Circuit (App. C, infra, A-25 through A-44) is reported at 757 So.2d 1, 99-0127 (La.App. 4th Cir. 3/3/99).

The Judgment of the District Court (App. B, infra, A- 19 through A-24) is unreported.

JURISDICTION

The Supreme Court of Louisiana declined to exercise its discretionary review on June 23, 2000 (App. D, infra, A-45). The decision of the Louisiana Court of Appeal for the Fourth Circuit, on rehearing for which review is sought, was entered on March 15, 2000. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257 and Rule 10 of this Court, in that the lower state courts have decided an important federal question in a way that conflicts directly with the decisions of this Court, the federal courts of appeals and the highest courts and lower appellate courts of the other states.

STATUTORY PROVISION/CONSTITUTIONAL ARTICLES INVOLVED

The "Supremacy Clause", Article VI, Section 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The "Full Faith and Credit Clause", Article IV, Section 1 of the Constitution of the United States provides:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The federal "Full Faith and Credit Statute", 28 U.S.C. 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof,

shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Summary

Albert J. Avenal, Jr. and certain other oyster leaseholders/fishermen filed a class action against the State of Louisiana, Department of Natural Resources ("DNR") in the 25th Judicial District Court for the Parish of Plaquemines on March 29, 1994 on behalf of all persons holding oyster leases on Louisiana state water bottoms within Breton Sound, an estuary in Southeastern Louisiana. These Plaintiffs alleged that a taking "had occurred" without "just compensation" in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 4, of the Louisiana

Constitution because their oyster leases were adversely affected by the freshwater outflow ftom the Caernarvon freshwater diversion structure located on the east bank of the Mississippi River in Plaquemines Parish. The trial court certified and defined the class of Plaintiffs.

Meanwhile, on April 26, 1994, Albert Avenal and these same representative Plaintiffs had also filed suit in the U.S. Court of Federal Claims[1] against the United States, i . e., the United States Army Corps of Engineers, which had designed, financed and built the Caernarvon structure. In that suit, these same Plaintiffs alleged a taking under the Fifth Amendment of the U.S. Constitution, the very issue raised in the state court proceeding.

The United States subsequently moved for summary judgment on several grounds, all related to the takings issue. One of these theories was that the Plaintiffs had no reasonable investment backed expectations in their oyster leases since they had decades of prior notice of the planning and construction of the project. Another was that the Plaintiffs had no compensable property interest in the continued, artificially elevated salinity conditions caused by the Mississippi River levee system, which, in turn, allowed for oysters to grow in historically fresh areas within Breton Sound. On August 2, 1995, the Court of Federal Claims granted summary judgment, concluding that the Plaintiffs had no compensable expectancy in the continued artificially elevated salinity levels in historically freshwater marsh areas in Breton Sound, areas which

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[1] Albert J. Avenal, Jr. et al. v. The United States of America", United States Court of Federal Claims, No. 94-26 1 -L.

were and are the subject of the instant litigation.

On November 12, 1996, the U.S. Court of Appeals for the Federal Circuit affirmed the lower court's judgment, but on different grounds[2] . The court held that these same oyster lessees could not have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversions of the state and federal governments.[3] In doing so, it restated and confirmed the federal position regarding takings law as set out by this Court.[4]

The court concluded by stating:

> In light of the history of events in this case, plaintiffs, as a matter of law must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.[5]

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2 Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

3 Id. at 937.

4 The Federal Circuit based its holding on Penn Central Transportation Co. v. City of New York, 438 U. S. 104, 98. S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

5 Avenal, 100 F.3d at 937.

B. Plaintiffs' Allegations in the Parallel Federal and State Proceedings

A comparison of the allegations set forth in the Plaintiffs' Federal Complaint and the Plaintiffs' Petition filed in the 25th Judicial District Court reveals that the cases deal with the identical factual issue: Whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure. More specifically, paragraph 7 of the federal Complaint and paragraph VIII of the state Petition alleged that the federal and state "actions," i.e., the diversion of freshwater from the Mississippi River to nourish, restore and refresh the State's wetlands, results in a taking. The Federal Complaint states as follows:

7.

> The hereinabove described actions of defendant have resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[6]

The Plaintiffs' State Court Petition states as follows:

VIII.

> As a direct result of the herein above described action of defendants, the productivity of plaintiffs'

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6 See App. J, infra, A-94 through A-104.

> leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[7]

With the exception of the identity of the named governmental defendant, the Petition filed in the 25th Judicial District Court is virtually indistinguishable from the Complaint filed in federal court. Although the names of the defendants are changed, the issue remains identical-whether a taking has occurred as a result of the operation of the Caernarvon freshwater diversion structure.

C. Proceedings Below

In accordance with the State trial court's pre-trial scheduling order, on December 15, 1998, DNR filed several motions for summary judgment, including one based on the issue of collateral estoppel. DNR asserted that the preclusive effect of the prior federal decision dismissing Plaintiffs' claims on summary judgment was an issue of federal law and required that the state court proceedings likewise be dismissed based upon federal common law, specifically collateral estoppel. The Honorable William A. Roe denied DNR's Motion from the bench on January 5, 1999.[8]

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[7] See App. K, infra, A-105 through A- 114.

[8] See App. B, infra, A-19 through A-24.

From that adverse decision, DNR filed an application for supervisory writs in the Louisiana Court of Appeal for the Fourth Circuit seeking to invoke that Court's discretionary supervisory jurisdiction. DNR's writ application was filed January 15, 1999, and the issues were fully briefed by both parties. On March 3, 1999, a five judge panel of the Fourth Circuit issued a 3-2 decision, reversing the Trial Court and granting DNR's Motion, thereby dismissing Plaintiffs' claims in their entirety. The Court based its ruling on the fact that the preclusive effect of a prior federal decision is an issue of federal law, and therefore applied federal law of collateral estoppel to decide the issue. On March 17, 1999 Plaintiffs filed an application for rehearing and/or rehearing *en banc*. The Fourth Circuit granted a writ of certiorari to review the entire twenty (20) volume record, presumably to determine whether the federal issues in both cases were the same, according to Judge Miriam Waltzer, the author of the original opinion.[9]

On March 15, 2000 the same five judge panel issued another 3-2 decision, this time reversing their prior decision and affirming the lower court's dismissal of the Motion for Summary Judgment. The Fourth Circuit ruled that collateral estoppel, whether based upon federal common law or any other source of law, would simply not apply in Louisiana. This element of the decision presented for the first time the issues which are the subject of this Petition.

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[9] See App. A, infra, A-15, dissent of Judge Waltzer.

Significantly, Judge Waltzer observed in her dissent, issued with the decision on rehearing, that the majority of the panel had issued a decision which conflicted directly with entrenched federal and state law on the issue, not to mention specific constitutional authority:

> In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. (Citations omitted.)[10]

The issue thus framed by Judge Waltzer presents the specific constitutional conflict that forms the basis for the Petition. It should be noted that the Court also concluded that this Court's reasonable investment-backed expectations test for a taking would never be used in Louisiana, deeming it "irrelevant."[11]

On April 14, 2000, DNR filed an application for supervisory writs with the Supreme Court of Louisiana, seeking to have that Court exercise its discretionary, supervisory jurisdiction. This application was denied on June.23, 2000. From these adverse decisions below, DNR seeks to invoke this Court's jurisdiction. In essence, Petitioner seeks to have the original decision of the Louisiana Court of Appeal for the Fourth Circuit reinstated, terminating the state litigation in line with the termination of the federal litigation.

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10 See App. A, infra, A-15, dissent of Judge Waltzer.

11 See App. A, infra, A-10.

REASONS FOR GRANTING THE PETITION

1) The Fourth Circuit's Opinion presents a direct conflict with applicable federal law as regards the preclusive effect of a prior federal decision in subsequent state court proceedings.

2) The Lower Court's decision also conflicts with applicable State law, including not only the law of Louisiana but also that of other states, on the same issue.

3) The question presented has serious public policy considerations in that a precedent has been set for federal factual findings to be relitigated in state courts. This will in turn generate piecemeal litigation and inconsistent findings on the state and federal levels, in direct contravention of the Supremacy Clause, the Full Faith and Credit Clause and the Full Faith and Credit Statute.

ARGUMENT

1. The Lower State Courts' Decisions Present a Direct Conflict with Federal Law.

The preclusive effect of a prior federal decision emanates from the United States Constitution's "Supremacy Clause"[12] and "Full Faith and Credit Clause",[13] as well as

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[12]Article VI, Section 2.

[13]Article IV, Section 1.

the federal "Full Faith and Credit Statute",[14] all of which require each state to give the same effect to the judgments of federal courts as those judgments have in the jurisdictions where rendered.[15]

The doctrines of *res judicata* and collateral estoppel are most important in assuring that judgments are conclusive, thus avoiding re-litigation of issues that were or could have been raised in the original action (*res judicata*) and of questions of law or fact necessary to the judgment in the original action (collateral estoppel).[16] The two doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." [17]

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14 28 U.S.C. § 1738.

15 Heck v. Humphrey, 512 U.S. 475, 488 n. 9, 114 S.Ct. 2364, 2373 n. 9 (1994); Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 437-438, 64 S.Ct. 208, 212- 213 (1943); Stoll v. Gottlieb, 305 U.S. 165, 167 - 171, 59 S.Ct. 134, 135 - 138 (1938); Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U.S. 141, 160, 7 S.Ct. 482, 474 (1887); Embry v. Palmer, 107 U.S. 3, 9 - 10, 2 S.Ct. 25, 27 - 30 (1872).

16 Kremer v. Chemical Construction Co., 456 U.S. 461, 102 S.Ct. 1883, 1889 n. 5, 72 L.Ed.2d 262 (1982); Cromwell v. Count of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876).

17 Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

When a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the federal law of *res judicata* which must be examined.[18] The federal rule of preclusion governs any federal judgment, even when the Court renders a decision on state law issues.[19] Further, the preclusive effect of a prior federal decision is not limited to the doctrine of *res judicata* and extends to collateral estoppel as well.[20]

II. The Lower State Courts' Decisions Conflict with Decisions of Other States.

The Courts of the States that have addressed this issue have likewise concluded that when a State court is required to determine the preclusive effects of a judgment rendered by a Federal court exercising federal question jurisdiction, it is the federal law of *res judicata*

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18 Nagle v. Lee, 807 F.2d 435, 439 (5th Cir. 1987); Chemtron Corp. v. Business Funds, Inc., 682 F..2d 1149, 1188 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007, cert denied, 406 U.S. 1013 (1983); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540-41 (5th Cir. 1981); Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), cert. denied, 423 U.S. 908, (1975); Restatement (2d) of Judgments - Section 87 (1982).

19 Recoveredge L.P. v. Pentecost, 44 F.3d 1284, 1290 n. 11 (5th Cir. 1995).

20 Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1422 (5th Cir. 1995); FDIC v. Lee, 942 F.Supp. 255, 257 (E.D. La. 1995); Abrams v. Morial, 968 F.Supp. 1106, 1109 (E.D. La. 1997).

that must be applied.[21] Louisiana Courts, until this matter, have observed "the principle that a State court must apply federal law in deciding upon at least the central core of *res judicata* effects of any Federal court judgment is immanent within the Constitution and laws establishing our federal system."[22] The Fourth Circuit's refusal to apply the federal rule of collateral estoppel also conflicts with a decision issued by the very same court.[23] Accordingly, the lower Courts' decisions in this matter present a direct conflict not only with applicable federal law, but also applicable state law, even that of Louisiana.

111. Application of the Federal Common Law of Collateral Estoppel Results in the Dismissal of Plaintiffs' Claims.

The federal law of collateral estoppel, which the trial court is required to apply, consists of four elements:

(1) The issue at stake must be identical to the one involved in the prior action;

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21 See, e.g., McNeal v. Paine Webber Jackson & Curtis, 332 (Ga. 1982); Anderson v. Phoenix Investment Council of Boston, 293 S.E.2d 440 N.E.2d 1164, 1167 (Mass. 1982); Rennie v. Freeway Transport, 656 P.2d 919, 921 (Or. 1982); Jeanes v. Henderson, 688 S.W.2d 100, 103 (Tex. 1985), rehearing of cause overruled (May 1, 1985); Restatement (2d) of Judgments section 87 (1982); C. Wright, A. Miller, & E. Cooper. Federal Practice & Procedure, Jurisdiction section 4468 (1981).

22 Pilie & Pilie v. Metz, 547 So.2d 1305, 1308 (La. 1989); Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993).

23 Stone v. Entergy Services, Inc, 99-0236*3 (La.App. 4th Cir, 8/18/99), 744 So.2d 141, 142; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989.

(2) The issue must have been actually litigated in the prior action;

(3) The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action; and

(4) There is no special circumstance that would make it unfair to apply the doctrine.[24]

All of the factors necessary for the court to apply the federal law of collateral estoppel have been met. First, as can be seen from the federal Complaint and the state court Petition, the takings issue is identical. Second, the takings issue was actually litigated in both the federal trial court and federal appellate court, with the appellate court specifically affirming summary judgment based on the fact that the Plaintiffs had no reasonable investment-backed expectations in their leases.[25] More importantly, the Fourth Circuit's opinion on rehearing does not indicate that there is any factual distinction between the two cases. As to the third element of the collateral estoppel test, the takings issue was a necessary part of the federal judgment. In fact, the decision on the takings issue was the core of the dispute. Finally, there is no special circumstance that would make it unfair to apply the doctrine of collateral estoppel.

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24 Copeland, supra, at 1423.

25 See App. C, infra, A-25 through A-44.

This Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[26] This application has been labeled defensive collateral estoppel, wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[27] As the United States Fifth Circuit has held, "collateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack."[28] In other words, the defensive use of collateral estoppel precludes a plaintiff from re-litigating identical issues by merely switching adversaries."[29] Stated succinctly, defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[30]

As the Federal Circuit affirmed the Court of Federal Claims' dismissal of the Plaintiffs' complaint on summary judgment, and all of the elements of collateral estoppel have been met, the Trial Court should have applied the doctrine of defensive collateral estoppel and dismissed the Plaintiffs' claims in the instant state litigation in their entirety. The

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26 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

27 Id.

28 Exhibitors Poster Exch., Inc. v. National Screen S.C., 517 F.2d 110, 114 (5th Cir. 1975).

29 Parklane Hosiery, supra, at 329, 651, citing Bernhard v. Bank of America Nat. Trust & Savings Assn., 122 P.2d 892, 895 (Cal. 1942).

30 Id.

mere substitution of governmental entities should not have resulted in a finding that collateral estoppel does not apply, where the factual record in the state and federal proceedings is, as here, identical.

CONCLUSION

If the lower State Court's decision is allowed to stand as is, a precedent will have been set for state courts to ignore the factual findings of a federal court deciding the same issue. This will not only lead to inconsistent decisions on the same issue but also spawn an entire wave of state litigation in which Plaintiffs may seek a "second bite at the apple." Plaintiffs will now be able to test their theories in federal court, and, if dissatisfied with the results, thereafter seek a different result on the same factual issue in a state court.

If allowed to stand, this decision will place at risk all governmental projects financed by combined State and Federal funding sources. Plaintiffs will test their theories in one court system or the other and then proceed to recovery in whichever court recognizes their claims. This anomalous situation encourges inconsistent findings by the Federal and State Court systems, in complete contravention of specific constitutional and statutory authority as interpreted by this Court.

RESPECTFULLY SUBMITTED,

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